MODERNISATION - A CONSULTATION ON

PROPOSALS TO GIVE EFFECT TO

COUNCIL REGULATION 1/2003 EC

SUBMISSION OF THE

CLA'S WORKING PARTY ON COMPETITION LAW

1. **Introduction**

1.1 These comments have been prepared by the Working Party on Competition Law of the Competition Law Association (CLA). The membership of the CLA includes barristers, solicitors and in-house lawyers, academics and other professionals including economists, patent and trade mark agents. The CLA's main object is to promote freedom of competition and combat unfair competition. Membership of the Working Party on Competition Law is open to all members of the CLA. We expressly invited all our members to take part in the present consultation exercise.

1.2 The CLA broadly welcomes the current proposals as it considers that close alignment of UK competition law with EC competition law is likely to improve legal certainty and to decrease the costs of compliance for business. In addition the CLA considers that it is important that enforcement of EC competition law at a national level should be carried out in a consistent manner to ensure not only that the United Kingdom complies with its member state obligations but also that United Kingdom business is treated on an equal footing with other businesses when trading both in the UK and in Europe.

2. **The Government seeks views on its proposal to remove the domestic notification system and to create a legal exception regime in the UK to correspond with that introduced by EC Council Regulation No. 1/2003 (the Regulation).**

The CLA supports the Government's proposal to remove the domestic notification system and replace it with the legal exception regime corresponding to that in the EC. Such abolition is broadly consistent with alignment with the EC modernisation proposals and is to be welcomed.

The CLA acknowledges the OFT's specific concerns if alignment on notifications is not effected and can see justification for those concerns.

3. **The Government also intends to clarify the boundary between the claimant and the defendant under this new system by making express provision on where the burden of proof lies.**

The consultation document elsewhere states that the Government does not propose to deal with the standard of proof as it is a matter for the courts. We agree with this proposition. We see no objection to clarification on where the burden of proof is to lie, provided such clarification does not change the basic obligation of the authorities to prove an infringement of competition law.

4. **The Government seeks views on whether the OFT should operate an extra statutory system of written Opinions in cases which raise genuine uncertainty because they present novel or unresolved questions of law under the Competition Act or Articles 81 and 82, or whether the current method of providing informal advice is sufficient for these purposes.**

As part of its modernisation exercise the EC Commission has agreed to issue written opinions in cases involving novel or unresolved points.

An opinion of the Commission will not be binding on NCAs or the courts and is intended to be published merely as guidance to companies addressing similar questions. The consultation indicates that the OFT for its part has provided informal advice in more than 190 cases since the Competition Act came into force. It is intended to continue this service which we welcome. In principle we consider that there may be benefits in having, in addition to and not in substitution for the informal guidance system, the possibility of written opinions subject to the following caveats, namely (1) that it should not be allowed to develop as a pseudo-notification system and (2) that it does not result in confusion between decisions and Opinions of the EC Commission and those of the OFT. In no case should it be possible to require the OFT to issue a written opinion: the system must be voluntary on both sides.

5. **The Government believes that existing powers to enter domestic premises without a warrant should be changed to require a warrant in every case.**

The Government is proposing to extend the OFT's powers in sections 25 - 29 of the Competition Act to investigations under Articles 81 and 82. It is also considering extending them to powers to investigate on behalf of the national competition authorities of other member states. The CLA considers that such powers are adequate for the purposes outlined.

Under modernisation the EC Commission's powers of search are extended now to non-business premises in circumstances where there is a reasonable suspicion that books and records related to the business are kept at those premises. Such powers can only be exercised by the EC Commission with the consent of the national judicial authority. A proposal from the Government to strengthen the safeguards of persons under investigation by requiring a warrant in all cases where there is to be an entry into domestic premises is welcomed by the CLA. The competition authorities have already been given very wide powers of investigation and we consider that the additional protection proposed of submitting requests to search domestic premises to independent judicial scrutiny is appropriate.

6. **The Government believes that the OFT should be given an express power to seal in connection with inspections, with or without warrant, both in relation to investigations concerned with Articles 81 and 82 and investigations concerned with the Chapter I and II prohibitions.**

Neither the OFT nor the EC Commission has an express power to seal premises under existing legislation. In practice, however, both do seal to prevent documents being tampered with or destroyed or to preserve documents when a search lasts more than a day. Under modernisation the EC Commission is now given an express power to seal **"for the period and to the extent necessary for the inspection"**. Seals should not normally be affixed for more than 72 hours. In practice when exercising the Competition Act powers documents are sealed whether executing a warrant under section 28 or in connection with section 27. An express provision dealing with sealing

is to be welcomed. The CLA notes that sealing may impede the business activities of the person under investigation and considers that sealing should not be continued for longer than absolutely necessary. This is recognised in the Police and Criminal Evidence Act 1984 ("PACE") Code B in the context of execution of search warrants in a criminal matter and the power to seize and sift. The officer may only exercise this power when the procedure is necessary to prevent items being concealed, lost, disposed of, altered, damaged, destroyed or tampered with. PACE Code B warns that officers "must be careful they only exercise these powers when it is essential and that they do not remove any more material than necessary. The removal of large volumes of material, much of which may not ultimately be retainable, may have serious implications for the owners, particularly when they are involved in business …….". We would argue a fortiori that a similar approach should be adopted by the OFT in relation to sealing under its civil powers.

7. **The Government considers that section 38(9) of the Competition Act should also apply when the OFT is considering breaches of Articles 81 or 82.**

The CLA welcomes the extension of this requirement that in imposing fines or penalties account must be taken of any penalties imposed by the EC Commission or in another member state in respect of the same agreement or conduct. We consider that the OFT should give guidance on what is likely to be treated as "the same agreement or conduct" for these purposes: this topic should be included in the OFT's guidance as to the appropriate amount of a penalty (see below). With the introduction of modernisation there is a real danger of double jeopardy for businesses involved in breach of competition law and the CLA welcomes this extension in the interests of fair treatment and the protection of human rights.

The European Court of Justice has already ruled that in principle undertakings should not be subject to double fines in respect of the same infringement.

8. **The Government proposes that the maximum penalties for infringement of the Competition Act prohibitions and Articles 81 and 82 prohibitions be aligned and seeks views on whether they should be aligned to match the Commission's maximum penalties or the OFT's current maximum penalties.**

The CLA firmly agrees that the penalties for EC and UK infringements should be aligned. It sees considerable scope for difficulty in relation to this if the penalties are not aligned as in practice the OFT may have to form a clear view on whether it is acting under Article 81 or 82 or the Chapter I or II Prohibition when it is clear that competition has been effected and the only issue is whether there has been a potential impact on member state trade. We welcome the fact that there is to be a separate consultation exercise on changes to the Guidance as to the Appropriate Amount of a Penalty published by the DGFT. In principle we would wish to see consistency of treatment by the EC and the UK authorities but we have concerns that the rules adopted by other member states may not be consistent with the practices of the EC Commission.

We note that there is no proposal for a one stop shop for leniency which we consider would assist effective enforcement of the competition rules. As a minimum we would welcome proposals for harmonisation of treatment across the EC under the various leniency programmes, and we urge the United Kingdom authorities to launch such a process.

The CLA believes that the sensible approach is for the UK penalty regime to be aligned on that of the EC. We note that the OFT is consulting on the possibility that penalties for EC law imposed by the OFT should be aligned with UK law. We consider that it would be contrary to the spirit of modernisation to act in this way. Modernisation seeks to ensure the common treatment of competition law infringements throughout the enlarged European Union. In the view of the CLA it would be contrary to the spirit of the modernisation exercise were the OFT to seek to introduce penalties based on breaches of the Competition Act in relation to its enforcement of EC provisions. Fragmentation of penalty regimes will result in practical difficulties and possibly in adverse effects on defence rights, as well as avoidable legal challenges by parties to infringements. Arguably adoption of a regime leading to such results would be a breach by the UK of its member state obligations to facilitate the achievement of the Community's tasks, for example to ensure that competition in the internal market is not distorted.

9. **In which circumstances should the OFT be able to accept commitments and in which circumstances should the OFT be able to re-open its proceedings after having accepted commitments?**

The CLA is of the view that the acceptance of commitments should be prescribed, under s.46(3) CA98, as a category of decision open to appeal under the Competition Act. We anticipate that it is intended to publicise the fact that commitments may be accepted in order to give interested persons an opportunity to make representations.

We consider that commitments should be accepted in circumstances where the conduct involved was not sufficiently anti-competitive to justify a large fine; where leniency is granted where the OFT can realistically police the commitments sought; and where the interests of innocent third parties would not be adversely affected by accepting the commitment. We would welcome further information on how the OFT will proceed where it is minded to accept commitments but the undertaking offering the commitments is under investigation by the EC or another member state in relation to the same agreement or conduct.

Under Article 9.2 of the Regulation the EC Commission may re-open proceedings if facts change materially; undertakings act contrary to their commitments; or if the commitment decision was based on incomplete, inaccurate or misleading information provided by the parties.

The CLA is of the view that the circumstances outlined in Article 9.2 of the Regulation is an appropriate basis on which to re-open commitment proceedings and believes that the same basis should be adopted by the Government.

10. **The Government's preferred method for dealing with a breach of commitment is to enforce the commitment by a court order.**

The EC Commission has been given power to impose fines of up to 10% of worldwide turnover for a breach of commitments. In addition it has the power to impose periodic penalty payments. The Government's options are to align the UK position with the EC; to treat a breach of commitments as a criminal matter; or to enforce a commitment by means of a court order (in parallel with the enforcement of OFT directions under the Competition Act). The CLA agrees with the Government's preference for enforcement of commitments by means of a court order, as it is our view that recourse to the courts, with the possibility of a committal for contempt, is the more effective and prompt enforcement route.

11. **Should rights of redress be afforded to third parties following an OFT decision accepting commitments and what should these be?**

As set out above the CLA considers that acceptance of commitments should be formally categorised as a decision which is open to appeal under the mechanisms already provided in the Competition Act.

12. **The Government believes the OFT should be able to give interim measures directions in relation to investigations under Articles 81 and 82 in the same way as it currently does under Section 35 of the Competition Act. The Government believes that all interim measures directions given by the OFT should be enforceable by court order.**

The CLA agrees that the OFT should be given formal power to order interim measures when exercising powers under Articles 81 and 82 as the EC Commission itself has such powers. At the EC level, however, a failure to comply with interim measures is dealt with by means of fine rather than court order. The grounds on which interim measures can be ordered under the Competition Act and the grounds available to the EC Commission are different. Under EU law the EC Commission must make a prima facie finding of infringement whereas under the Competition Act the OFT need only have a reasonable suspicion that a prohibition has been infringed. The Government proposes to extend the less onerous reasonable suspicion test to the OFT in circumstances where it is investigating under Articles 81 and 82. The CLA accepts that there has to be alignment but considers that the reasonable suspicion test is too low when applied to interim measures as opposed to powers to investigate. It would, in our view, be more appropriate to operate a test similar to that used by the courts when granting interim injunctions, which in many ways are similar in effect to interim measures. It considers that a more detailed review of this issue is required with a view to revision of section 35 of the Competition Act taking into account human rights issues and the need to avoid unduly intrusive interim measures.

Competition Law Association

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